

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

IN RE:

ZELE BREWING COMPANY,

Debtor

* CHAPTER 7
* BANKRUPTCY
* NO. L91-00377D

FILED
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

MAY 04 1994

BARBARA A. EVERLY CLERK

RELEASE AND SATISFACTION OF JUDGMENT

COMES NOW, the Brewery, a Wisconsin General Partnership by and through Joseph C. Niebler, general partner, and hereby releases Crompton & Knowles Corporation and satisfies the judgment entered regarding the Brewery's Motion for Sanctions as awarded by the United States Bankruptcy Court for the Northern District of Iowa on April 6, 1994, by the Honorable William L. Edmonds.

Dated this 28 day of April, 1994.

THE BREWERY, A WISCONSIN
GENERAL PARTNERSHIP

Joseph C. Niebler
By: Joseph C. Niebler,
General Partner

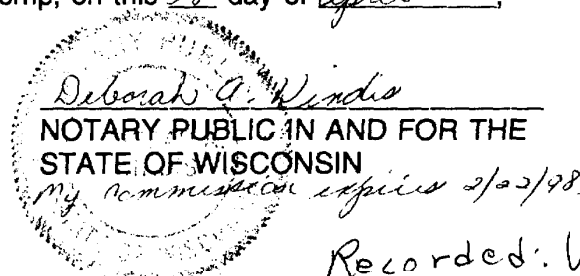
STATE OF WISCONSIN

SS:
COUNTY OF Wauchesa

Subscribed and sworn to before me by Joseph C. Niebler, General Partner of The Brewery, a Wisconsin General Partnership, on this 28 day of April, 1994.

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filing attorney
on 6/6/94

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Recorded: Vol III
page 212

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

U.S. BANKRUPTCY COURT X
NORTHERN DISTRICT OF IOWA

APR 07 1994

IN RE:

BARBARA A. EVERLY, CLERK

ZELE BREWING COMPANY,

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Chapter 7

Debtor.

)

Bankruptcy No. L91-00377D

ORDER RE: MOTION FOR SANCTIONS

The matter before the court is a motion by The Brewery seeking sanctions against Crompton & Knowles Corporation (C & K). Telephonic hearing was held February 23, 1994. Thomas G. McCuskey and Jeffrey P. Taylor appeared for C & K. Joseph C. Niebler appeared for The Brewery, a Wisconsin general partnership.

Findings

In February 1992, the case trustee filed his motion seeking approval of a sale of various property of the estate. He also sought compromise of certain claims against the estate. Several parties-in-interest, including C & K, objected. At trial of the resulting contested matter proceedings, the trustee's counsel announced a tentative agreement among the parties and asked for a continuance of the hearing so that the parties could reach a final agreement.

In mid-May, the trustee filed an amended motion seeking approval of a sale of estate property and a compromise of certain claims. As before, the sale was to include the sale of personalty and the transfer of the estate's rights in a leasehold interest (SUBLEASE) which had been held by the debtor. The

proposed buyer was Dubuque Brewing and Bottling Company (DUBUQUE BREWING).

Because the transfer of the sublease was thought to be subject to the consent of the sublessor, it was agreed that it would be "the responsibility of the Trustee to secure C & K's consent to Buyer's assumption of Zele Brewing Company's duties and obligations under the sublease, or to obtain an order of the Court confirming the validity of the transfer of the Sublease without such written consent." (Agreement for Sale of Assets, exhibit 1 to Trustee's amended motion (docket 286)). The court granted the amended motion by Order entered June 24, 1992 (docket no 296).

On April 6, 1993, Dubuque Brewing filed a motion requesting the court to compel C & K to execute certain documents prepared for consummation of its purchase of assets from the trustee (docket no. 341). C & K responded to Dubuque Brewing's motion by raising issues related to the pending matter and which have since been resolved between Dubuque Brewing and C & K.

The Brewery and American Trust & Savings Bank (AT&SB) jointly filed a bare joinder in the Motion to Compel (docket no. 349). The Brewery alleged the grounds for its joinder in a "supplement" filed June 4, 1993 (docket no. 355). Counsel and general partner for The Brewery, Joseph C. Niebler, alleged that C & K had refused to execute and deliver closing documents despite prior agreement to do so. The Brewery asked that C & K

be ordered to sign the documents and that sanctions be awarded on the ground that there was no basis in law or fact to support C & K's refusal to execute and deliver the documents.

Trial on the motion to compel was held June 10, 1993, in Cedar Rapids. On June 11, 1993, the court entered its order granting the motion to compel, requiring C & K to execute certain closing documents and to deliver them to the trustee by June 18, 1993. The court denied the request for sanctions mistakenly believing that The Brewery had not included the request in the motion. The court's order was appealed by C & K.¹

On June 30, 1993, The Brewery filed for sanctions and an order of contempt against C & K, alleging that C & K had failed to execute and deliver the documents as ordered (docket no. 367). As sanctions, The Brewery requested an award of legal fees and expenses in the amount of \$8,809.33 through June 11, 1993. Dubuque Brewing (docket no. 370) and AT&SB (docket no. 371) each joined in the motion. However, neither is any longer participating in the proceedings.

C & K resisted the motion (docket no. 372, filed July 6, 1993). C & K gave its pending appeal as its reason for failing to sign and deliver the documents (docket no. 372, ¶ 10). C & K was concerned that complying with the order would render its appeal moot (docket no. 372, ¶ 14).

¹ The appeal was dismissed by the District Court on March 14, 1994 (docket no. 430).

On July 30, 1993, on the basis of C & K's failure to comply with the June 11 order, the court ordered C & K to appear and show cause why it should not be held in civil contempt (docket no. 385).

Hearing on the show cause order was held September 14, 1993. John T. Ferguson, C & K's general counsel and secretary appeared as the corporation's representative. The corporation was also represented by legal counsel. The court examined Ferguson who explained that C & K had failed to execute the documents because it had appealed the order and compliance would defeat its appeal. Ferguson testified that it was thought that the court was without jurisdiction to enforce the order while it was the subject of appeal.

The court found the argument to be without merit and ruled that C & K was in contempt (Order, docket no. 402). The corporation was given ten days to comply with the court's prior order before civil penalties would be imposed. Part of those penalties included the legal fees requested by The Brewery and by AT&SB. The court later clarified this aspect of its ruling by indicating that if C & K complied with the court's order within the ten days, the sanctions, including legal fees, would not be imposed, but that this circumstance would be without prejudice to The Brewery's pursuit of its separate motion seeking sanctions (docket no. 408).

C & K executed and delivered the documents to the trustee within the prescribed time, and the court thereafter issued its

order that C & K was no longer considered in contempt and that the order regarding contempt would be of no further effect (docket no. 410). The court set for hearing The Brewery's motion for sanctions. The Brewery supplemented its motion on February 11, 1994 (docket no. 423). It asked for sanctions against C & K in the form of legal fees and expenses from C & K's initial failure to sign through September 30, 1993. It seeks sanctions in the amount of \$23,030.11. Hearing on the motion was held February 23, 1994, by telephone. Joseph C. Niebler appeared for The Brewery. Thomas G. McCuskey and Jeffrey Taylor appeared for C & K.

Discussion

The Brewery seeks sanctions under Fed.R.Bankr.P. 9011 contending that C & K's responses to the Motion to Compel and the Motion for Sanctions were either frivolous or filed for an improper purpose, in that neither was well grounded in fact nor warranted by existing law.

The Brewery characterizes C & K's response to Dubuque Brewing's initial motion as an assertion by C & K that its local counsel did not have the authority to bind C & K to an agreement to execute certain documents without the client's consent. It appears to the court that The Brewery is attempting to find a violation of Rule 9011 based on a pleading that raised issues never tried by the court. Initially, it was Dubuque Brewing that filed the motion to compel. Under the purchase agreement,

it was to be the assignee of the trustee's rights in the sublease. The response filed by C & K raised the issue that the document (relating to the sublease) which it was being requested to execute had the potential of causing timing problems as to the performance of purchase obligations at the termination of the lease. The court recollects that the dispute between Dubuque Brewing and C & K related to the closing document creating different times for performance of purchase obligations by sublessor and sublessee. The court cannot precisely and accurately state the nature of the dispute, but that is owing in part to the fact that the dispute was resolved by settlement and never tried to the court. On the present record regarding sanctions, the court is not able to find that C & K's Response to Motion to Compel violated Rule 9011.

C & K's argument that its attorneys did not have authority to agree on its behalf to the execution of the closing documents was an issue that either arose or was crystallized after The Brewery had joined the fray. The court's ruling specifically indicated that it did not need to reach the issue as C & K would be required to sign all documents because it had bargained for and taken advantage of some and that all had been part of the closing package of which C & K was aware. It may be that officers at C & K never authorized its Iowa attorneys to represent that all the documents would be signed. That factual issue was not determined by the court; C & K did not lose the motion to compel on a finding that authorization was given. The court

found that it did not matter. Even if true, the court would not permit C & K not to sign the documents. But the pleading complained of did not raise the factual or legal issue now alleged to violate Rule 9011. As to the pleading, Rule 9011 sanctions are not appropriate.

The Brewery says also that C & K's response to its motion for sanctions and order for contempt violated Rule 9011. The resistance (docket no. 372) asserted that C & K's appeal of the court's order was the basis for C & K's continued failure to sign. C & K responded that it believed that to sign the documents would be to render its appeal moot, and further that the court had no jurisdiction to enforce, pending appeal, an order that constituted a mandatory injunction.

C & K also now contends that in refusing to comply with the court's order pending appeal without obtaining a stay of that order was a course of action adopted on advice of its counsel and that C & K's reliance should mitigate any penalty.

The court determined in its June 17 order that the first two arguments were without merit. That an appeal could become moot if the order were obeyed is a motive for requesting a stay, not for a reasonableness for disobedience of the order.

For the proposition that absent a stay C & K should have obeyed the order despite its appeal, the court relied on the decision of the Eighth Circuit Court of Appeals in Brown v. Ramsay (In re Ragar), 3 F.3d 1174 (8th Cir. 1993). Although the

the decision was very recent at the time of the September 14 hearing on contempt (decided August 30, 1993), and counsel for C & K may not have been aware of it, nonetheless, the decision called it "hornbook law that the mere fact that an order is erroneous does not mean that a party may violate it with impunity. A court's order must, in all but the most extreme cases, be obeyed, unless the party against whom the order is directed can obtain a stay. If the order is not obeyed, the party in violation may be held in contempt, even if he or she later succeeds in getting the order overturned on appeal." Id. at 1180 (emphasis added). The issue was legal, and C & K's written resistance on this point was not well grounded in the law. Sanctions are appropriate under Fed.R.Bankr.P. 9011(a). Even if sanctions were not awarded under Rule 9011, the court would award sanctions for the contempt. It was the court's intention to award the fees request of The Brewery without analysis of its itemization as a sanction to enforce the court's order. The fact that this was not done because C & K finally complied does not alleviate the fact that C & K was in contempt, although it purged itself from further sanctions by compliance. Nonetheless, it was responsible for The Brewery's having to make an effort to see that it obtained the documents required by the order of June 11, 1993. Reliance by C & K on the advice of its counsel in this case is no excuse. It was not reasonable to believe that the court order could be disobeyed merely because of the filing of the appeal. The Brewery is entitled to an

award of fees as either a sanction for contempt or under Rule 9011.

The award of fees and costs should not go back to the initial motion to compel. The Brewery's motion was nothing more, at that point, than an effort to force compliance with an agreement with C & K. Sanctions should not apply until C & K failed to abide by the court's order of June 11, 1993. Noncompliance began on June 19. Compliance was had on September 30.


The court has examined Joseph Niebler's affidavit regarding fees and costs (docket no. 425) and its exhibits F, G and H) and finds that fees should be awarded for legal work done between June 18 and September 15, 1993. The Brewery will be awarded fees and costs as sanctions in the following amounts (legal rates will be limited to the prevailing upper rates for similar services in the Northern District):

Joseph Niebler	65.25 hours at \$125 =	\$ 8,156.25
law clerks	9.50 hours at \$ 40 =	380.00
John E. Feldbruegge	22.50 hours at \$125 =	2,812.50
costs for the period		
for phone, tapes,		
search, postage,		
transcripts, Clerk's		
fees, Westlaw		<u>604.22</u>
Total		\$11,952.97

ORDER

IT IS ORDERED that the motion for award of sanctions is granted. Sanctions are awarded in favor of The Brewery and against Crompton & Knowles Corporation in the amount of \$11,952.97. Crompton & Knowles shall have 20 days to make payment to The Brewery. Judgment shall enter accordingly.

SO ORDERED ON THIS 6th DAY OF APRIL, 1994.



William L. Edmonds, Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and judgment by U. S. mail to:

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

APR 07 1994

BARBARA A. EVERLY, CLERK

In re:

ZELE BREWING COMPANY,

Chapter 7

Debtor.

Bankruptcy No. L91-00377D

JUDGMENT

This proceeding having come on for trial or hearing before the court, the Honorable William L. Edmonds, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED: that the motion for award of sanctions is granted. Sanctions are awarded in favor of The Brewery and against Crompton & Knowles Corporation in the amount of \$11,952.97. Crompton & Knowles shall have 20 days to make payment to The Brewery.

Vol. III
Page 212



BARBARA A. EVERLY
Clerk of Bankruptcy Court

By: *Lorris Styer*
Deputy Clerk

[Seal of the U.S. Bankruptcy Court]
Date of Issuance: April 7, 1994